KHOO KAY HOCK v. E.J. KETTING & ORS.

[F.C. (Ong Hock Sim, Raja Azlan Shah and Chang Min Tat F.JJ.) December 7, 1977 and March 4, 1978]

[Penang — Federal Court Civil Appeal No. 167 of 1977]

Practice and Procedure — Writ claiming damages for negligently causing death of deceased — No indorsement that plaintiff claiming for the benefit of dependants — Statement of claim stating action brought for benefit of dependants — Whether writ cured by subsequent statement of claim — Schedule of assets annexed to grant of letters of administration did not include claim in action — R.S.C. 1957, O. 2 r. 1, O. 3 r. 2, O. 20 r. 4 & O. 25 r. 4 — Estate Duty Enactment, 1941, ss. 33, 42(i) & 45(ii) — Probate and Administration Act, 1959, s. 59 — Civil Law Act, 1956, ss. 5, 7(7) & 8.

The appellant had taken out a writ against the respondents claiming damages for negligently causing the death of the deceased. The writ was indorsed for the benefit of the estate of the deceased but it did not contain an indorsement that the plaintiff was also claiming damages for the benefit of the dependants. However, in the statement of claim it was stated that the action was brought for the benefit of the estate as well as for the benefit of the dependants. At the hearing it was contended that the plaintiff had no title to institute the action as (1) the schedule of assets annexed to the grant of letters of administration did not include the claim or claims; (2) the plaintiff had failed to comply with the statutory requirements of section 7(7) of the Civil Law Act, 1956, as the writ did not give particulars of the persons for whom or on whose behalf the writ was brought. The learned trial judge held that the law relating to the collection of estate duty did not determine the title of the personal representative of a deceased person to sue but he upheld the submission on the second issue and held that to allow amendment of the writ to include the full particulars of the dependants would involve another and a different course of action and would deprive the dependants (respondents) of the defence of limitation under section 5 of the Act. The appellant appealed.

Held: (1) the schedule of property to the grant of letters of administration did not in law affect the title of the personal representative of a deceased person to institute legal proceedings and the trial judge was correct in deciding that the appellants be allowed to file a corrective affidavit;

(2) although the writ contained technical defects amounting to an irregularity, the subsequent delivery of a proper statement of claim cured the defects as the rights of the defendants-respondents were not prejudiced;

(3) as long as the action was commenced within the prescribed period the court was not concerned with good or bad indorsements.

Cases referred to:-

(1) *Chua Chee Chor* v. *Chua Kim Yong & Ors.* [1960] M.L.J. 127, 130.

(2) *Bowler* v. *John & Klowlem & Co. Ltd.* [1954] 3 All E.R. 556.

(3) *Weldon* v. *Neal* (1887) Q.B.D. 394, 395.

(4) *Large* v. *Large* [1877] W.N. 198.

(5) *Hill* v. *Luton Corporation* [1951] 2 K.B. 387.

(6) *Grounsell* v. *Cuthell* [1952] 2 Q.B. 673.

(7) *Pontin* v. *Wood* [1962] 1 Q.B. 594.

FEDERAL COURT.

Harbinder Singh (*Oliver Phipps* with him) for the appellant.

Jag-Jit Singh (*Subash Chandran* with him) for the respondents.

Raja Azlan Shah F.J. (delivering the judgment of the Court): This is an appeal and cross-appeal against the judgment of the learned trial judge in Penang dated August 25, 1977.

On March 13, 1975, the plaintiff (the appellant) issued a writ against the first and second defendants as agents and servants of the third defendant with a claim for damages for negligently causing the death of the deceased at the Hospital Adventist (Penang Adventist Hospital) on September 5, 1972. The writ was indorsed for the benefit of the estate of the deceased under section 8 of the Civil Law Act 1956 (Revised 1972). There was no statement in the indorsement on the writ that the plaintiff was also claiming damages for the benefit of the dependants under section 7 of the said Act. The defendants entered unconditional appearance on May 21, 1975. The statement of claim was issued on April 29, 1975. By paragraph 1 the plaintiff claimed that he brought the action for the benefit of the estate of the deceased person as well as for the benefit of the dependants. The statement of defence was delivered on May 21, 1975.

At the hearing on June 1977, the defendants, instead of making an application to strike out the pleading under Order 25 rule 4, raised two preliminary objections. First, that the plaintiff had no title to institute the action because the schedule of assets annexed to the grant of letters of administration did not include the claim or claims in the action, and secondly, that the plaintiff had failed to comply with the statutory requirements of section 7(7) of the Civil Law Act 1956 (Revised 1972). The subsection reads:

"the plaint or writ or summons in any such action shall give full particulars of the person or persons for whom or on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered."

The plaintiff sought leave to amend the writ.

On the first issue it was contended for the defendants in the court below that by virtue of the provisions of section 45(ii) of the Estate Duty Enactment 1941, the schedule of property of the deceased person in this case attached to the grant of letters of administration "shall contain a description of all the property passing on the death of a deceased person" and as the schedule of property of the deceased did not disclose that there was a claim for damages, it was argued that the plaintiff had no title to institute the action.

Section 45(ii) of the Estate Duty Enactment 1941 enacts:

"A schedule of the property of a deceased person in respect of which estate duty has been paid in such form as may be prescribed by rule of court or a certificate that payment of estate duty has been postponed authenticated by the signature of the Collector shall be annexed to the grant of representation. Such schedule shall contain a description of all the property passing on the death of a deceased person whether estate duty is leviable on such property or not."

Counsel for the plaintiff argued that if the schedule of property was defective it could be cured by delivery of a corrective affidavit in the prescribed form and payment of the difference between the duty leviable according to the true value of the estate and the duty already paid with interest. The relevant provisions of the law cited are sections 33(i) and 42(i) of the said enactment which are as follows:

"33.(i) Every person applying for representation shall to the best of his knowledge and belief disclose by an estate duty affidavit all the property in respect of which estate duty is payable on the death of the deceased.

42.(i) If any time after assessment by the Collector it is discovered that for any reason duty should have been paid or too little duty has been paid the accountable person shall within one month of the discovery or within such further time as the Collector may allow deliver to the Collector a corrective affidavit in the prescribed form and shall pay the difference between the duty leviable according to the true value of the estate and the duty already paid and shall at the same time pay to the Collector interest upon such additional duty as is in this Enactment provided."

The learned trial judge correctly held that the law relating to the collection of estate duty did not determine the title of the personal representative of a deceased person to sue. His powers are conferred by section 59 of the Probate and Administration Act 1959 (Revised 1972). It reads:

"Subject to any other written law, a personal representative has the same powers to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts due to him at the time of his death as the deceased had when living."

Following the dictum of Smith J. in *Chua Chee Chor* v. *Chua Kim Yong & Ors.*,[1] he held that failure to include a right of action as an asset in the list annexed to the grant of letters of administration did not affect a personal representative's statutory powers to sue in respect of all causes of action that survive the deceased person. He then granted an adjournment to enable the plaintiff to file a corrective estate duty affidavit and, in accordance with the provisions of section 45(ii) of the Estate Duty Enactment 1941, obtain from the Collector of Estate Duty an amended schedule of property to be attached to the grant of letters of administration. He awarded the defendants costs of the adjournment.

We feel that the objection raised on behalf of the defendants has no merit. We therefore agree with the decision of the learned trial judge that the plaintiff be allowed to file a corrective affidavit in proper form. The schedule of property to the grant of letters of administration does not in law affect the title of the personal representative of a deceased person to institute legal proceedings. It does not affect him one way or another. It is only a description of the property to be administered and not a description of his status to sue. The indorsement on the writ that the plaintiff is bringing the action in a representative capacity as administrator is the crucial matter. See Order 3 rule 4 of the Rules of the Supreme Court. See also *Bowler* v. *John & Klowlem & Co. Ltd.*[2]

The object of the law relating to the collection of estate duty is a fiscal measure enacted to secure revenue for the State on certain classes of property on death. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of this law are conceived in the interest of revenue and once that object is achieved according to law, the party founding his claim on the schedule will not be defeated on the ground of the initial defect in the said schedule. We indorse what was said by Smith J. in *Chua Chee Chor* v. *Chua Kim Yong & Ors.*, *supra*, and reproduce it here:

"The principal object of the schedule to the grant of Letters of Administration appears to be for the purpose of ensuring that correct security is given. It does not prove the deceased's title to the property scheduled."

With regard to the second preliminary issue the learned judge upheld the submission of counsel on behalf of the defendants that to allow amendment of the writ to include the full particulars of the dependants for whom or whose behalf the action was brought (section 7(7) of the Civil Law Act) would involve another and different cause of action and that it would deprive the defendants of a defence under subsection 5 of the said Act. The subsection reads:

"Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased."

He principally relied on the opinion of Lord Esher M.R. in *Weldon* v. *Neal*.[3]

"If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust."

In that case the original claim was based on slander. At the new trial the claim as amended set up in addition to the claim for slander fresh claims in respect of assault, false imprisonment and other causes of action, which at the time of amendment were barred by the Statute of Limitation. The amendments were disallowed on the ground that they prejudiced the rights of the defendant who would be deprived of the benefit of the Statute of Limitation. The factual basis of the case was that it concerned the issue of a writ which at the date of the amendments of claims was statute-barred. But Lord Esher went on to say that under very peculiar circumstances the court might perhaps have power to allow such amendments.

We would like to stress here that the application for leave to amend the indorsement on the writ was unnecessary once a proper statement of claim had been delivered (see *Large* v. *Large*).[4] In the circumstances the line of argument which was directed to the provisions of subsection 5 of section 7 of the Civil Law Act does not arise as the necessity to amend the writ was misconceived.

The real question with which we are faced here is as to whether or not the writ which was defective on the ground of failure to state the full particulars of the persons for whom and on whose behalf the action was brought was cured by the subsequent delivery of a proper statement of claim which was delivered well within time.

The learned judge seems to think that only a statement of claim containing full particulars of the dependants could cure a defective indorsement on the writ, and as the statutory provisions of section 7(7) of the Civil Law Act did not require a statement of claim to contain those particulars, whereas it was imperative that the writ should have them in the indorsement, he concluded distinguishing *Hill* v. *Luton Corporation*[5] that a statement of claim without those particulars did not cure the defect in the indorsement

on the writ. He found the argument of counsel on behalf of the defendants commendable and adopted it. It is necessary to reproduce it here: —

"They (counsel) therefore argued that unlike the position in England the statement of claim here need only comply with the Rules of the Supreme Court, 1957, but a writ in this country must comply with the substantive provisions of section 7(7) of the Civil Law Act, 1956, and a defective writ here therefore cannot, as in England and because of the slightly different provisions of the said section 4 of the English Fatal Accidents Act, 1846, be cured by a proper statement of claim."

We do not agree with that reasoning. In a dependancy action under section 7(7) of the Civil Law Act the statement of claim shall state the full particulars of the person or persons for whom or on whose behalf the action is brought and of the nature of the claim of which damages are to be recovered. The word "or" should be read as "and". The writ too shall be indorsed with a statement of the nature of the claim (Order 2 rule 1) but not the precise ground of complaint (Order 3 rule 2). If the writ contains technical defects amounting to an irregularity, the subsequent delivery of a proper statement of claim cures the defects provided they do not prejudice the defendant's rights, e.g., depriving him of the benefit of a period of limitation (see *Hill* v. *Luton Corporation, supra; Grounsell* v. *Cuthell*[6]). In *Pontin* v. *Wood*,[7] a much stronger case, the defective indorsement: "The plaintiff's claim is for damages for personal injuries" was cured by the subsequent delivery of a proper statement of claim, albeit after the expiry of the limitation period. The Limitation Acts only required that the writ should be delivered within the prescribed time.

The claim for the remedy under section 7 of the Civil Law Act is given to individual dependants and not to them as a group. What subsection 7 of that section envisages is that not more than one action shall be brought by all the dependants within 3 years of the death of the person deceased. As long as the action is commenced or in other words the writ is issued (Order 2 rule 1) within the prescribed period this court is not concerned with good or bad indorsements. The whole of the defendants' case is disposed of by Devlin J.'s observations in *Hill* v. *Luton Corporation* (*supra*, page 391) that "the (Limitation) Act is not concerned with good or bad indorsements: the only question to be determined under it is whether the action has been commenced within the twelve months".

In the present case the plaintiff issued his writ and served it on the defendants well within time. They knew perfectly well that the plaintiff was claiming damages for negligently causing the death of the deceased at the Penang Adventist Hospital. Yet they seek to bar him on the most technical point — just because he omitted to indorse the words "for the benefit of the dependants, etc." on the writ. We do not think that we should allow this technical objection to prevail. We should apply the well-known words of Holroyd Pearce L.J. in *Pontin* v. *Wood* (*supra*, page 297) when he said that the court would give its aid "to regularising the procedure of a known genuine case commenced before the time limit expired but containing technical defects". That in our opinion will fully satisfy Order 20 rule 4 which reads:

"Whenever a statement of claim is delivered the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ."

We feel the learned judge had failed to direct his mind within the ambit of this general rule.

We therefore allowed the appeal with costs and dismissed the cross-appeal with costs.

Appeal allowed.
Cross-appeal dismissed.

Solicitors: *Harbinder Singh & Co.; Jag-Jit Singh & Co.*

NADEFINCO LTD. v. KEVIN CORPORATION SDN. BHD.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) January 10 and March 20, 1978]

[Kuala Lumpur — Federal Court Civil Appeal No. 90 of 1977]

Practice and Procedure — Limitation — When time begins to run — Contract by mining company for payment of debt by instalments — Guarantee — Failure to pay instalment — Company subsequently wound up — Cause of action accrued when first instalment not paid — Limitation Ordinance, 1953, s. 6(1)(a).

In this case a mining company was in arrears of payment of tribute to the tune of $130,000 due to the respondents. A contract was made whereby the mining company agreed to pay the amount due by instalments, the first instalment to be paid on January 20, 1968. The appellant and two other persons jointly and severally guaranteed the payment. The company did not pay a single instalment and on November 1, 1971 it was wound up. The respondents sued the appellants for the sum of $125,000 which was the limit of the guarantee. The claim was filed on June 19, 1975. The appellants pleaded limitation. The respondents thereupon applied for summary judgment. The application was disallowed by the Senior Assistant Registrar but on appeal to the High Court leave was given to the respondent to sign final judgment. The appellant appealed.

Held, allowing the appeal: the cause of action in this case accrued the instant the mining company failed to pay the first instalment due and therefore the action was barred by limitation, the action being commenced more than six years after the cause of action arose.

Cases referred to:-

(1) *Wilkinson* v. *Verity* (1871) L.R. 6 C.P. 206, 209.

(2) *Reeves* v. *Butcher* [1891] 2 Q.B. 509.

(3) *McHenry McDermott* v. *Boyd* [1894] 3 Ch. 290.

(4) *Lakshmijit* v. *Faiz Mohamed Khan Sherani* [1974] A.C. 606.

(5) *Hemp* v. *Garland* 4 Q.B. 519.

FEDERAL COURT.

B.K. Ong for the appellants.

C. Abraham for the respondents.

Wan Suleiman F.J.: There are two judgments in this case, written by the L.P. and the C.J. Borneo, and I agree with both of them.

In their absence, I shall read first the L.P.'s judgment. (Reads).

Suffian L.P.: (read by Wan Suleiman F.J.): The plaintiffs granted a mining company a sub-sublease under which the company was to pay the plaintiffs tribute. The company was in arrear to the tune of $130,000.